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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 462

POWERS HIGGINBOTHAM,

Appellant,

vs.

CITY OF BATON ROUGE.

APPEAL FROM THE SUPREME COURT OF THE STATE OF LOUISIANA.

BRIEF ON BEHALF OF APPELLEE ON THE MERITS AND ON THE MOTION TO DISMISS APPEAL.

FRED G. BENTON,
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BRIEF ON BEHALF OF APPELLEE ON THE MERITS AND ON THE MOTION TO DISMISS APPEAL.

Statement of Facts.

Plaintiff-appellant, Powers Higginbotham, filed this suit against defendant-appellee, City of Baton Rouge, hereafter called City, to recover the sum of $7,957.76 with legal interest from judicial demand, under an alleged contract of employment. The case was decided below on an exception of no cause or demurrer.

These in substance are the allegations of plaintiff's petition:

First, it is shown that appellee is a municipal corporation organized and existing under the laws of the State of Louisiana, and that by the provision of Act 207 of 1912, appellee was provided a commission form of government,

of three departments, namely, Mayor and Commissioner of Public Health and Safety, Commissioner of Finance, and Commissioner of Public Parks and Streets.

That under the provisions of Act 20 of 1921 the terms of these officers were fixed at four years and the date of election fixed as the first Tuesday of April, every four years, commencing on the first Tuesday of April in the year 1927.

That on April 1, 1931, appellant was elected Commissioner of Public Parks and Streets for a four-year term that began on the 4th day of May, 1931; and that appellant qualified and assumed the duties of the office on the first Monday of May, 1931, and that he continued to hold the office and to perform its functions until January 10, 1935.

That by Act 41 of the Second Extraordinary Session for the year 1934 the election of officers for the City of Baton Rouge was postponed until the first Tuesday following the first Monday in November, 1936, and the incumbents were continued in office until their successors were elected and qualified, and that thus the effect of this act was to extend appellant's term of office until the first Tuesday following the first Monday of November, 1936.

That by the provisions of Section 4 of Act 13 of the Third Extraordinary Session for the year 1934, which became effective on the 10th day of January, 1935, appellant's office was abolished and its official authority and power transferred to the Mayor and Commissioner of Public Health and Safety, with a provision therein reading as follows:

> "That the person now filling the office of Commissioner of the Department of Public Parks & Streets *shall be entitled to enter the employ of the said City of Baton Rouge at a salary equal to that heretofore allowed by law to said person as the Commissioner of the Department of Public Parks & Streets, in the work un-*

der the said Mayor and said person shall have the right to continue in said service during good behavior until the next general election of officers in said municipality."

That at the time of the adoption and effective date of said latter act, appellant was the duly elected and qualified Commissioner of the Department of Public Parks & Streets and that his salary was legally fixed in the sum of $5,000.00 per year.

That at a special meeting of the Commission Council called and held on the 9th day of January, 1935, the following resolution was adopted:

"Be it ordained by the Commission Council of the City of Baton Rouge, La.: That under the provisions of Act No. 13 of the 3d Extra Session of the Legislature of Louisiana of 1934, the office of the Commissioner of Public Parks & Streets having been abolished and all of the authority, powers and functions of that Department having been transferred to the Mayor, and the present incumbent of said Commissionership being entitled by said Act to enter the employ of the City in the work under the Mayor with the right to continue in said office during good behavior and until the next regular municipal election, that therefore, Powers Higginbotham, present Commissioner of Public Parks and Streets be and *he is hereby employed by the City of Baton Rouge, La., as Superintendent of Public Parks and Streets, under the Mayor of the City of Baton Rouge, La., at the same salary now provided for the Commissioner of Public Parks and Streets, his employment to continue during good behavior and until the next general election for municipal officers.*"

That thereupon appellant gave up his office and immediately accepted the employment from the Council at the same salary as he had been paid as Commissioner, and to continue in said employment until the next general election for the

officers of the City of Baton Rouge, all as shown by a certified copy of said resolution annexed to appellant's petition.

That appellant then entered into the service of the City and faithfully discharged the duties required of him until the 22nd day of March, 1935, at which time according to his petition, he was released or discharged from his said employment illegally and without just cause.

That the State Legislature of the First Extraordinary Session of 1935 by Act 1 amended Section 4 of Act 13 of the Third Extraordinary Session for the year 1934 so as to cause said section to read as follows:

> "In the City of Baton Rouge the office of Commissioner of the Department of Public Parks and Streets is hereby abolished, and all authority, powers and functions thereof are hereby transfered to and shall be exercised by and under the Commissioner of the Department of State Coordination and Public Welfare, as ex-officio Commissioner of Streets and Parks of said City, and in, and for said City of Baton Rouge there is hereby created the Department of State Coordination and Public Welfare, the duties and authority of which shall include the administration of the public parks and streets of said City and arrangements necessary for said City to render to and be rendered by the State such facilities and services as are mutually necessary to same as may be authorized by law and said City of Baton Rouge; there shall be a Commissioner of the said Department of State Coordination and Public Welfare, who shall be ex-officio Commissioner of Streets and Parks, and who shall receive a salary of Five Thousand ($5,000.00) Dollars per year in charge of said Department, and who shall be elected at the regular municipal election in and for said City and pending said election the said office shall be filled by appointment of the Governor by and with the advice and consent of the Senate. The provision of this Section heretofore enacted requiring the employment of the person theretofore exercising the functions of Commissioner of the Department of Streets and Parks be and the same is hereby repealed."

That appellant's discharge on said date, that is, March 22nd, 1935, was based upon the Mayor and Commission Council's assumption the provisions of said Act 1 of the First Extraordinary Session for the year 1935 had the effect of terminating appellant's foregoing contract of alleged employment.

That appellant was not removed for incompetency or neglect or misbehavior, nor was any complaint ever made against him by the Mayor, or by the Commission Council, and that appellant never at any time assented to the adoption of said Act 1, or to his removal as an employee under the said contract, and that he was at all times ready and willing and able to perform and carry out his said alleged contract.

That the City under its charter and without reference to said Act 13 of the Third Extraordinary Session of 1934 had the power to enter into said contract with appellant, and that the provisions of said Act 1 did not have the legal effect of depriving the Council of the authority to continue appellant's employment.

That if the purpose and intent of said Act 1 was to strip the Council of that authority and to terminate appellant's contract, then said act was an abrogation or impairment of appellant's said contract in violation of the provisions of Section 15 of Article 14 of the Constitution of the State of Louisiana, and of the provisions of Section 10 of Article 1 of the Constitution of the United States.

That in the budget adopted by the Council for the year 1935 provision was made for the payment of appellant's salary in the sum of $5,000.00 per year.

That at the time of his employment appellant was to continue until the first Tuesday after the first Monday in November of the year 1936, or for a period of one year, nine months and 26 days, and that at the time of his dis-

charge the unexpired period under said contract was one year, seven months and 12 days.

That appellant was paid for all services rendered by him up to the first day of April, 1935, but that appellee has failed and refused to pay him any sum since that date, and that appellant is entitled to recover the amount prayed for representing his salary for the unexpired term.

The exception of no cause of action or demurrer filed by respondent City was sustained by the trial court and on appeal to the Supreme Court of the State of Louisiana the decision of the lower court was affirmed, and plaintiff's suit was finally dismissed at his costs. The matter is on appeal before this Court upon an order granted by the Supreme Court of the State of Louisiana. The full decision by the Supreme Court is printed in the "Transcript of Record" at page 15, *et seq.*

A comprehensive review of the relevant legislative enactments will enable the Court to better appreciate the issues presented.

Act 169 of 1898, as amended, is the charter of the City of Baton Rouge. This charter is still in full force and effect, and is the legislative guide for all municipal proceedings except as hereafter noted. In 1914, without giving up, amending or abandoning said charter, but following the procedure outlined by Act 207 of 1912 generally known as the "Commission Form of Government Act", the electors of the City of Baton Rouge changed from the Councilmanic to the Commission Form of Government, subject to the provisions of said Act 169 of 1898, and of said Act 207 of 1912, in the manner provided, and thereafter and to this date the said City has been governed by the provisions of both of said Acts. Section 20 of Act 207 of 1912 makes this provision:

> "That *all of the powers belonging to any City that shall organize under the provisions of this Act, con-*

ferred either by its Charter or by law, not inconsistent with, contrary to, or in conflict with the provisions of this Act, shall be preserved to said City unimpaired, to be exercised by the Mayor and Council elected under the provisions hereof.'' (Italics ours.)

And Section 4 of the same Act provides:

"* * * In the Cities of the Second Class these powers and duties shall be divided into and distributed among three departments, as follows:

1. Department of Public Health and Safety.
2. Department of Finance.
3. Department of Public Parks and Streets."

The effect of this was to provide the City with three Commissioners each to serve a term of four years in lieu of a Mayor and Councilmen as was first provided.

In 1921 Section 47 of Act 169 of 1898 (the Charter) was amended by Act 20 of the special session for that year so as to cause the said section to read as follows:

"The General Municipal election shall be held on the first Tuesday in August, 1922 and the officers then elected shall take their office on September 1st, 1922 and shall serve for a period of four years and eight months, or until their successors have been elected and qualified. Their successors shall be elected on the first Tuesday in April, 1927, and thereafter said election shall take place every four years on the first Tuesday in April. All officers shall be chosen by a plurality of the votes cast, and shall take their offices on the first Monday in May following their election, except those elected in August, 1922."

This provision was the law until 1934 when the election date was changed for all municipalities having elections in 1935, and a special date was fixed for Baton Rouge by the

adoption of Act 41 of the Second Extra Session for that year, reading in Section 1 thereof as follows:

> "That in all cases where by any law or by its Charter, any municipality is required to hold an election for the purposes of choosing officers during the year 1935, the said election shall be postponed for a period of one year, except the City of Baton Rouge where the election shall be postponed until the first Tuesday folowing the first Monday in November, 1936, and the officers presently serving shall continue in office until their successors are elected and qualified."

Under the provisions of Act 20 of the special session for the year 1921 the appellant was elected as Commissioner of Public Parks and Streets in April, 1931, and began his term of office on May 4, 1931. By the provisions of said act his term of office of four years would have expired on the first Monday in May, 1935. Under the provisions of the Act just quoted above, this elective term was extended to November, 1936, and so if there had been no further legislation he would have served not only the original four-year period he was elected to serve but an additional period of a year and a half, and his full term would have been five and one-half years.

The second extra session of 1934 convened on November 12, and adjourned on November 16, and the legislation enacted became effective twenty days thereafter. Hardly had the provisions of said Act 41 become effective when the legislature was convened in a third Extra Session and adopted Act No. 13, section 21 of which reads as follows:

> "* * * Provided that cities or towns that have heretofore voted to come under or adopted the provisions of Act No. 302 of 1910 and Act No. 207 of 1912, shall continue to operate under said Act 302 of 1910 and Act 207 of 1912 as modified by this Act, and except as otherwise provided herein."

And sub-section 1 of Section 4 of the act was the "except as otherwise provided herein" that again affected the City of Baton Rouge. This subsection reads as follows:

> "In the City of Baton Rouge the office of Commissioner of the Department of Public Parks and Streets is hereby abolished, and all authority, powers and functions thereof are hereby transferred to and shall be exercised by and under the Mayor of said city, and in and for said City of Baton Rouge there is hereby created the Department of State Coordination and Public Welfare, the duties and authority of which shall include the arrangements necessary for said City to render to and be rendered by the State such facilities and services as are mutually necessary to same and may be authorized by law and said City of Baton Rouge: there shall be a Commissioner of the said Department of State Coordination and Public Welfare, who shall receive a salary of Five Thousand Dollars ($5,000.00) per year, in charge of the said Department, and who shall be elected at the regular municipal election in and for said City, and pending said election the said office shall be filled by appointment of the Governor by and with the advice and consent of the Senate; provided that the person now filling the office of Commissioner of the Department of Public Parks and Streets of said City shall be entitled to enter the employ of the said City of Baton Rouge, at a salary equal to that heretofore allowed by law to said person as the Commissioner of the Department of Public Parks and Streets, in the work under the said Mayor and said person shall have the right to continue in said service during good behavior until the next general election of officers in said municipality."

And so it will be seen that appellant's term of office for which he had originally been elected in 1931, and which originally expired in May, 1935, and which had been extended to November of 1936 came suddenly to an end on January 10, 1935, when said Act 13 of the Third Extra Session of 1934 became effective. The Council convened in special session

on January 9, the day before the said Act became effective to take necessary action thereunder. The appellant was present at this meeting, and participated without protest therein. After due deliberation the following ordinance was adopted:

> "Be it ordained by the Commission Council of the City of Baton Rouge, Louisiana, that under the provisions of Act No. 13 of the Third Extra Session of 1934, the office of the Commissioner of Public Parks and Streets having been abolished and all authority, powers and functions of that Department having been transferred to the Mayor, and the present incumbent of said Commissionership being entitled by said Act to enter the employ of the City in the work under the Mayor with the right to continue in said office during good behavior and until the next regular municipal election, that therefore, Powers Higginbotham, present Commissioner of Public Parks and Streets be and he is hereby employed by the City of Baton Rouge, Louisiana, as Superintendent of Public Parks and Streets, under the Mayor of the City of Baton Rouge, Louisiana, at the same salary now provided, for the Commissioner of Public Parks and Streets, his employment to continue during good behavior until the next general election for municipal officers."

Appellant was present at this meeting, as shown, and participated therein without protest, and voted in favor of the foregoing ordinance. In the minutes of that meeting made a part of plaintiff's petition, we find this notation:

> "Mr. Higginbotham advised the Council that he would accept the employment, as provided for in said ordinance."

Thereafter he assumed and perfo med the duties of the Commissioner of Public Parks and Streets in the new capacity from January 10, 1932, when the act abolishing his office became effective up to March 22, 1935, when Act No. 1

of the First Extra Session of 1935 was adopted, amending Section 4 of Act 13 of the Third Extra Session of 1934, which had barely been in effect two months, causing subsection 1 of Section 4 under the last amendment to read as follows:

> "In the City of Baton Rouge the office of Commissioner of the Department of Public Parks and Streets is hereby abolished, and all the authority, powers and functions thereof are hereby transferred to and shall be exercised by and under the Commissioner of the Department of State Coordination and Public Welfare, as ex-officio Commissioner of Streets and Parks of said City and in and for said City of Baton Rouge there is hereby creat d the Department of State Coordination and Public Welfare, the duties and authority of which shall include the administration of the public parks and streets of said City and arrangements necessary for said City to render and be rendered by the State such facilities and services as are mutually necessary to same as may be authorized by law and the said City of Baton Rouge; there shall be a Commissioner of the said Department of State Coordination and Public Welfare, who shall be ex-officio Commissioner of Streets and Parks, and who shall receive a salary of Five Thousand ($5,000.00) Dollars per year, in charge of said Department, and who shall be elected at the regular municipal election in and for said City, and pending said election the said office shall be filled by appointment of the Governor with the consent of the Senate. The provision of this section heretofore enacted requiring the employment of the person theretofore exercising the functions of Commissioner of the Department of Public Parks and Streets be and the same is hereby repealed."

The Council again convened in special session at noon on March 22, 1935, at the hour when the last amendment became effective, and concluded that appellant's employment under the provisions of Act 13 of the Third Extra Ses-

sion of 1934 was a legislative mandate that had been terminated and revoked by the latter statute, and that the City was thus without authority to retain him in its employ, and thereby his employment came to an end.

Appellant contends that the city ordinance aforesaid providing him with employment as Superintendent of Parks and Streets in the work "under the Mayor" was in effect a contract between the City and him—(an alleged third person) so as to create in him a vested contract right for the balance of the term, and that the legislative enactment ending that employment and immediately assigning all of his duties to the new Commissioner of the Department of State Coordination and Public Welfare, an appointee under the Governor, violated State and Federal constitutional provisions prohibiting the impairment of such vested contract rights.

Respondent City not only contended that Act No. 1 of the First Extra Session of 1935 and the City's action taken thereunder was legal and Constitutional, but also contended that under its original charter, as well as under other sections of Act 13 of the Third Extra Session of 1934, the respondent City had the right, without cause, to discharge appellant at any time as is stated above.

Motion to Dismiss Appeal.

Respondent appellee has filed a motion in this suit to dismiss the appeal for lack of jurisdiction. The latter motion, embodying the authorities to support it has been separately printed and are made a part of the present record entitled "Motion to Dismiss".

In support of the motion to dismiss it is shown in Paragraph 2 thereof as follows:

> "Now appellee shows as a basis for the present motion that in fact there was both a Federal and a State

or local question involved in the decision of the case, and that the Supreme Court of the State of Louisiana actually decided the case favorably to the appellee on both grounds, and that the State of local question involved in the case was sufficient to sustain the judgment and decree of the said State Supreme Court, and that therefore the Federal question is only collaterally involved, and is not necessarily a basis for said judgment and decree."

In answer to this motion appellant has filed a brief in opposition thereto in which he concedes that the decision rendered by the Supreme Court is based upon a local or non-Federal question, but he contends that the real crux of the decision involved the constitutional point, and that the non-Federal aspect of the matter is in effect spurious and irrelevant.

Before discussing this point we reiterate a fact emphasized in the motion to dismiss, page 4, *et. seq.*, namely, that after passing upon the constitutional question adverse to plaintiff's contention, the Supreme Court of the State of Louisiana then proceeded to say that, conceding the entire correctness of appellant's contention as to the constitutional matter presented, that, nevertheless, respondent City must prevail because under other sections of the State law, the validity and constitutionality of which were not drawn in question, the members of the Commission Council had the authority to release appellant at any time without cause, and without notice.

This alternative conclusion is an independent fact sufficiently broad to fully support the conclusion reached by the Supreme Court of the State of Louisiana without reference to the Federal question raised.

Appellee concedes that under the doctrine of *Ward* v. *Love County*, 253 U. S. 17, 64 L. Ed. 751, and *Abie State Bank* v. *Bryan*, 282 U. S. 765, 75 L. Ed. 690, and other

cases cited in appellant's opposition, that where the jurisdiction of this Court is invoked on the ground of denial of a Federal right by a State court, this Court has a right not only to determine whether the right was denied in direct terms, but also whether it was denied in substance and effect by interposing a non-Federal ground of decision. In the case of *Ward, supra,* this Court said this:

> "Non-federal grounds put forward by the highest state court as the basis for its decision, but which are plainly untenable, cannot serve to bring the case within the rule that the Federal Supreme Court will not review the judgment of a state court where the latter has decided the case upon an independent ground not within the Federal objections taken, and that ground is sufficient to sustain the judgment."

It follows of course that in order for this Court to take jurisdiction of the case under such circumstances, the non-Federal ground must be "plainly untenable" or must be in effect spurious and irrelevant.

In *Ward, supra,* where this Court took jurisdiction, the issue involved was as to the right of a county within a State to assess Indian lands and to seize and sell these lands so assessed, where any such assessment was expressly prohibited by an act of Congress. The case was clearly one where the county's action was contrary to the said Federal Statute, and the case of necessity involved the application of said statute. Similarly, in the case of *Abie State Bank, supra,* the question presented developed out of a contention by a number of banks that a certain assessment under a State law was so arbitrarily prejudicial as to be equivalent to a confiscation of property rights. The alleged non-Federal issue was related to the facts of the case rather than to the legal principle entering into a proper decision of the case, and there was no way by which the alleged non-Federal

ground could reasonably be interpreted to independently and adequately support the conclusion reached by the court.

His Honor, Justice Holmes, made this pertinent and correct observation:

> "But the Federal ground being present, it is incumbent upon this court when it is urged that the decision of the state court rests upon a non-federal ground to ascertain whether the asserted non-federal ground independently and adequately supports the judgment."

Applying these principles to the present case, it should not be difficult for the court to conclude that the doctrine of these cases is not applicable here.

It is first to be observed that the non-Federal ground here in question was in reality the main basis upon which appellant's defense under the exception was founded.

Section 7 of Act 169 of 1898, appellee's original charter, provides as follows:

> "The Council shall likewise at its first meeting after election or as soon thereafter as practicable, elect * * * and other employees as may be deemed necessary. *They shall be subject to removal as hereinafter specified.*" (Italics ours.)

Section 52 of the Charter as amended by Act 249 of 1914 provides as follows:

> "*All officers elected by the Council shall be removable by the Council at pleasure.*" (Italics ours.)

Section 8 of Act 207 of 1912 which was the original "Commission Form of Government Act", and which was in effect re-enacted by the said Act 13 of the Third Extra Session of 1934, contained this provision that was retained by reference in the said Act 13:

> "* * * *Any officer or assistant elected or appointed by the Council may be removed from office at any time*

by a vote of a majority of the members of the Council, except as herein otherwise provided." (Italics ours.)

The exception last noted relates to elective officers only.

The Act No. 13 of the Third Extra Session of 1934 under which appellant was employed in the work "under the Mayor" does not change any of these provisions, but on the contrary expressly provides in Section 21 that except *as modified by said Act 13 of the Third Extra Session of 1934 all of the provisions of Act 207 of 1912 shall prevail. In the original Act No. 217 of 1912 in Section 20 all of the powers and authority conferred upon the City by its charter, being Act 169 of 1898, or by any other law not inconsistent with the provisions of Act 207 of 1912 were declared reserved to the City unimpaired to be exercised by the Mayor and the Commission Council elected under the provisions of the said Act 207 of 1912.*

Thus, it is clear that both under the authority of its original charter, as well as under the original Act 207 of 1912 and the subsequent Act 13 of the Third Extra Session of 1934, appellee was expressly vested with the authority to terminate appellant's employment and to remove him from his job as Superintendent of Public Parks and Streets at any time.

Opposing counsel argues that when appellant was employed by the City of Baton Rouge under Section 4 of the said Act 13 of the Third Extra Session of 1934 that this was a special legislative mandate and that under Section 21 of said Act 13 "all laws or parts of laws in conflict with" its provisions were repealed. In this very repealing clause, however, Act 207 of 1912 was expressly continued in full force and effect, and we have already shown that under Act 207 of 1912 the Council was vested with the authority to remove appellant at will. The mandate in question authorizing appellant's employment "in the work under the Mayor

. . . to continue in said service during good behavior until the next general election of officers in said municipality" is not reasonably or even logically in conflict with the said Section 8 of Act 207 of 1912, or in conflict with Sections 7 and 52 of Act 169 of 1898, as amended by Act 249 of 1914. The Legislature was simply providing by the employment in the "work under the Mayor" work that was in the nature of a new office, or a new work, and was stipulating the time that this new office or new work was to continue subject to the other relevant provisions of the existing law. If it had been intended that appellant was to remain in this special work or special employment for the time stipulated over the express desire of the majority of the Commissioners, then it would seem that these other provisions in the law clearly reserving to the majority of the Commissioners the right to remove him at will would have been likewise amended so as to make an exception of his case. That was not done, and the Supreme Court of the State of Louisiana correctly held that under these other provisions of the law the City Council acted strictly within its legal authority in terminating appellant's employment without reference to said Act 1 of the First Extra Session of 1935 the constitutionality of which is drawn in question here. In view of this ruling it is plain that the conclusion reached by the State Supreme Court is supported by an independent, non-Federal ground sufficiently broad to wholly eliminate the necessity of this Court passing upon the constitutionality of the said Act 1 of the First Extra Session of 1935.

In this connection appellee respectfully contends that this is not only a *bona fide* non-Federal question of a nature that strips this Court of jurisdiction, *but that in fact this non-Federal question has been correctly decided by the State Supreme Court.* Pretermitting the latter point the only issue before this Court under the motion to dismiss is not whether the State Supreme Court has correctly decided this

non-Federal issue, but whether the said issue is real and substantial.

This Court has held in *Eustis* v. *Bolles*, 150 U. S. 361, 37 L. Ed. 1111, and in numerous other cases. that if there is both a Federal and a State question presented in a case of this nature and said State Supreme Court passes upon both questions, but the decision as to the State question is sufficiently broad alone to sustain the conclusion reached, then unless the latter issue is without any semblance of merit, this Court will not take jurisdiction.

Eustis v. *Bolles, supra;*

John A. Adams v. *James Russell*, 33 Sup. Ct. Rpr. 846;

Cuyahoga River Power Company v. *Northern Realty Company*, 37 Sup. Ct. Rpr. 643, 244 U. S. 300, 61 L. Ed. 1153;

Whitney v. *People of State of California*, 47 Sup. Ct. Rpr. 641, 274 U. S. 351, 71 L. Ed. 1095;

Murdock v. *Memphis*, 20 Wall. 596, 22 L. Ed. 429.

In attempting to support his position that a real non-Federal issue is not presented in this case sufficiently broad to sustain the conclusion of the State Supreme Court, opposing counsel in effect is calling upon this Court to pass upon or interpret certain provisions in the State law that have been interpreted and passed upon by the court below in this same case.

The principal of law is so well established in the jurisprudence of this Court as to hardly warrant citation of authority that an interpretation of State law by its own highest tribunal will be accepted by this Court as binding. If the other provisions of the State law relied upon by appellee were manifestly immaterial to the issues presented, this Court could take jurisdiction. But counsel's argument to support this Court's jurisdiction is not that these other provisions in the State law are irrelevant and immaterial but rather his contention is that the conclusion reached by the

State court in the interpretation of these State laws is incorrect. Manifestly, this Court will not take jurisdiction to reverse the State Supreme Court of Louisiana on an issue of this nature.

On the Merits.

THE CONTRACT CLAUSE OF THE CONSTITUTION IS OF NECESSITY SUBORDINATE TO POLICE POWER AND MANIFESTLY NO PUBLIC OFFICER OR EMPLOYEE PERFORMING A DUTY RELATED TO PERMANENT PUBLIC OF GOVERNMENTAL SERVICES CAN ACQUIRE A VESTED CONTRACT RIGHT THE EFFECT OF WHICH IS TO DENY UNTO THE CREATIVE OR GOVERNING AUTHORITY THE RIGHT TO ABOLISH SUCH OFFICE OR TERMINATE SUCH EMPLOYMENT AT WILL.

Appellant was, of course, entirely correct when he made no effort to oppose the legislative enactment abolishing his original office. In Louisiana, as in other States, the legislature has the right to create municipalities at will, and then to abolish, alter or amend the charter rights so given at will. Such charters do not create vested contract rights, except where acting by virtue thereof a municipality enters into a contract with a third person. In *Moore* v. *City of New Orleans*, 32 La. Ann. 726, the Supreme Court of Louisiana, at an early time, said:

> "The powers of municipal governments are simply a delegation of the powers of the State government and both are, in the same manner and to the same extent, subject to legislative control and discretion."

In the case of *Laten* v. *City of New Orleans*, 12 La. Ann. 915, the Supreme Court of Louisiana held that the legislature has the right to entirely abolish a city government existing under a legislative charter, and these changes as to city charters can be made without any express reservation of the right to make them. *Crescent City Gas & Light*

Co. v. *New Orleans Gas & Light Co.*, 27 La. Ann. 138; *State* v. *Board of Education*, 4 La. Ann. 398; *New Orleans Gas & Light Company* v. *Louisiana Light Heat Producing & Mfg. Co.*, 29 L. Ed. 516; *New Orleans Water Works Co.* v. *Rivers*, 29 L. Ed. 525; *Moore* v. *City of New Orleans*, 32 La. Ann. 726; *Carondelet Canal & Navigation Co.* v. *Lugger Lst, Chevere Tedesco & Owner*, 37 La. Ann. 100; *State* v. *Peoples Slaughtering House & Refrigeration Co.*, 41 La. Ann. 1031.

As to the right to abolish a public office we quote from the *Succession of Bragg*, 12 Orleans Appeal, 299:

> "One who holds a public office or employment (meaning of course public employment) by election or appointment even for a fixed time, has no such contract with the government or appointing body as to prevent the legislature or proper authority from abolishing the office or diminishing its duration of pay or removing him from office, but after the services have been rendered under a law or resolution which fixes the rate of compensation there arises an implied contract to pay for those services at that rate, the obligation of which is vested and perfect."

25 L. Ed. 710

This Court in *Newton* v. *Commissioners*, ~~100 U. S. 599~~, and in many other cases has recognized the general proposition that a State may abolish any public office created by public law.

In his argument throughout, the opposing counsel has conceded that if the appellant's employment in the "work under of Mayor" as Superintendent of Public Parks and Streets were equivalent to a public office, it would be subject to abolition at the legislative will.

To sustain his contention in the face of this admission counsel seeks to show that while appellant's office was and could be abolished that when by the same legislative enactment the duties of that office were converted to an alleged

employment under the Mayor that by this act some strange metamorphosis occurred that caused the latter alleged employment to become a vested contract right.

The principal case relied upon to support this position is *Hall* v. *State of Wisconsin*, 2[illegible] L. Ed. 302. In that case neither a public office or a public employment was involved. The Governor of the State entered into a contract of employment with certain commissioners for a special work, and for a fixed period of time, at a designated rate of compensation. It was expressly provided in the act, as well as in the contract that the employment was to continue until the 3rd day of March, 1936, "unless the said Hall should be removed for incompetency or neglect of duty * * * or unless a vacancy shall occur in his office by his own act of default."

The commissioner so employed was removed by the legislature before the expiration of the contract term, and thereafter brought suit to recover compensation for the full period. He alleged that he had not been removed for incompetency or neglect of duty, as was provided in the statute under which he was employed, nor had any complaints ever been made against him. The State contended that this was a public office created by public law and that there was the reserved right to abolish such office.

This Court admitted the correctness of this contention, but found that the work in question was not a public office, but rather, the court said in effect, it was in the nature of a special employment for a limited time, created by a special act wherein the manner of its termination was prescribed, and that such a contract was a contract with a third person that created a vested right, and that it could not be ended except by the expiration of the term, or in the manner indicated by the statute.

The case is inapplicable here for several reasons. There the court was dealing with *a specific contract with a third*

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person for a limited time, and *for a special purpose unrelated to a public office or to public or governmental duties.* The court in effect said that if this had been a public office or equivalent to a public office, it could have been abolished at legislative will.

Here admittedly the appellant occupied a public office to which he had been elected. That office was abolished, and there was substituted in lieu thereof a public employment under the Mayor. There was no change in appellant's duties whatever, except that he was stripped of his official status as a member of the Council and was brought under the control of the Mayor. He was still performing a public service not of a special or limited nature, but having to do with a permanent aspect of city government. He was still in effect a public officer, but if not technically so, nevertheless he was by his own admission an employee performing public duties. Under these facts there certainly could be no less right on the part of the legislature to abolish the so-called employment, than there was to abolish the office. In the case of *Hall* v. *State of Wisconsin, supra*, there was no reserved right in the State to end the contract except for cause. Even as to a private employment of the nature there involved if there had been an express reservation of the right to end it, then undoubtedly that right could have been freely exercised. In the present case a public office or, in the alternative, a public employment is involved, and furthermore the legislature has given the city both in its original charter and in the Commission Form of Government Act the right to create employments and to remove such employees at will. And the city creates no vested contract rights by entering into such employments.

Pretermitting the foregoing, Section 18 of Article 19 of the Constitution of the State of Louisiana provides that "the exercise of police power of the state shall never be abridged", and this Court as well as other courts through-

out the nation has repeatedly held that the police power is not alienable and that it can not be bartered or impaired by contract, and that clauses of the Federal and State Constitutions guaranteeing due process of law and vested contract rights against impairment have always yielded to its proper exercise.

State v. *Walmsley*, 162 So. 826; *Osborn* v. *Nicholson*, 13 Wall. 654, 660, 20 L. Ed. 689; *Boston Beer Co.* v. *Massachusetts*, 97 U. S. 25, 24 L. Ed. 989; *Stone* v. *Mississippi*, 101 U. S. 814, 819, 25 L. Ed. 1079; *Boyd* v. *Alabama*, 94 U. S. 645, 650, 24 L. Ed. 302; *New Orleans* v. *New Orleans Water-Works Co.*, 142 U. S. 79, 12 S. Ct. 142, 35 L. Ed. 943; *Atlantic Coast Line R. Co.* v. *Goldsboro*, 232 U. S. 548, 34 S. Ct. 364, 58 L. Ed. 721; *Manigault* v. *Springs*, 199 U. S. 473, 26 S. Ct. 127, 50 L. Ed. 274; *Louisville & Nashville R. Co.* v. *Mottley*, 219 U. S. 467, 31 S. Ct. 265, 55 L. Ed. 297; *Hudson County Water Co.* v. *McCarter*, 209 U. S. 349, 28 S. Ct. 529, 52 L. Ed. 828, 14 Ann. Cas. 560; *Rail and River Coal Co.* v. *Yaple*, 236 U. S. 338, 35 S. Ct. 359, 59 L. Ed. 607; *Noble State Bank* v. *Haskell*, 219 U. S. 104, 31 S. Ct. 186, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1062, Ann. Cas. 1912A 287; *Perry* v. *United States*, 294 U. S. 330, 55 S. Ct. 432, 79 L. Ed. 912, 95 A. L. R. 1035; *Norman* v. *Baltimore & Ohio R. Co.*, 294 U. S. 240, 55 S. Ct. 407, 79 L. Ed. 885, 95 A. L. R. 1352; *Nortz* v. *United States*, 294 U. S. 317, 55 S. Ct. 428, 79 L. Ed. 907, 95 A. L. R. 1340; *Treigle* v. *Acme Homestead Ass'n*, 181 La. 941, 160 So. 637; *Harris* v. *Monroe Building & Loan Ass'n* (La. App.), 154 So. 503.

The principle has been applied not only in relationship to an act that is an exercise of police power, but likewise so as to retain in the state or the municipality, as the case may be, the plenary right to terminate the duties of any officer, employee or person exercising such power and whether in an administrative capacity or otherwise.

Clearly the duties of appellant's office as Commissioner of Parks and Streets were of a nature so as to be definitely related to the public welfare; or to the police power in the same sense as in the above cases. These were duties in which the public had an interest, and the nature of which were not changed by the legislative enactment abolishing appellant's office, and substituting in lieu thereof an "employment under the Mayor" as Superintendent of Parks and Streets, whether that employment was a public office or not.

The general principle appellant invokes is elemental, and is one we do not dispute in cases to which it has been correctly applied. It is evident, however, in this case, that what the legislature did was to change or amend the charter right in reference to a public duty or function, and that such charter right is not a contract creating vested contract rights in the sense in which appellant contends, nor is appellant either as an officer or an employee of the city a third person in favor of whom such vested rights might be created and exercised.

It is, of course, true that if a municipality or any agency of State enters into a franchise or contract with a third person in pursuance to proper legislative authority these agreements do create vested rights that cannot be destroyed or impaired by subsequent legislation. These rights are protected by the provisions of the State and Federal Constitutions invoked by the appellant in this case, securing contract rights and prohibiting their destruction or impairment. As is shown above, however, these constitutional rights must yield where the exercise of legislative authority, whether directly or through a municipality or other agency of state, has to do with the police power in the sense of the public welfare or the public good. It follows, of course, that a charter right as distinguished from a contract or franchise right is not in the sense which appellant contends a contract. It is

true that under such charter if the City is authorized to make a contract with a third person where the subject matter is not a governmental function and such contract is entered into, vested rights arise therefrom that cannot be subsequently impaired.

The cases cited in counsel's brief are of the latter nature. In the case of *Panhandle Pipe Line Company* v. *State Highway Commission of Kansas*, 294 U. S. 613-623, 79 L. Ed. 1090, the court was dealing with an alleged police regulation that definitely invaded private property rights so as to be equivalent to the taking of private property without compensation. In *Lochner* v. *New York*, 198 U. S. 45, 49 L. Ed. 937, the court was dealing with the issue as to the legality of a State law fixing sixty (60) hours as a compulsory basis of work for bakery employees as against the conte tion that such legislation interfered with the freedom of contract. In the case of *Grand Trunk Western Railway* v. *City of South Bend et al.*, 227 U. S. 544, 57 L. Ed. 633, the court was again concerned with the reasonableness of a police regulation which would have the effect of destroying priva'e property rights. There is no argument to be made against the point that the State can not invade and in effect confiscate or destroy property rights without compensation, and without due process of law, in the guise of adopting an alleged police regulation.

It is not necessary that we indulge technical distinctions in the classification of public officers and public employees. The vital fact is that the appellant's work as Superintendent of Public Parks and Streets was in practical effect a continuation of the duties which he had performed as Commissioner of the Department of Public Parks and Streets; in fact, identically the same duties insofar as administrative matters were concerned. It is difficult to understand how appellant as Superintendent of Public Parks and Streets could be regarded as a third person with whom the City had

entered into a contract in the sense appellant contends so as to create a vested contract right where the whole action was nothing more than a legislative process to bring about changes in the City Charter.

All of the cases cited and relied upon by appellant are instances where a municipality or a governmental agency has entered into a contract with a third person who is not identified with the municipality or governmental agency whether as an officer or as an employee, to perform a work or to supply a need or service of a limited or special nature and of a character which is not related to public duties or to permanent governmental functions. If the work to be performed or the services to be rendered or the thing to be supplied is special and limited and unrelated to public service then it is well and good that such contract should be classified as any other contract between private individuals, and should be protected against impairment by subsequent legislative enactments or otherwise. But to apply that principle to a case like this where appellant was still performing all the administrative duties of a Commissioner of Public Parks and Streets is manifestly unsound. If such principle were recognized and enforced by this Court it would so hamstring, embarrass, hamper and paralyze municipalities and other governmental agencies in respect to all questions of public welfare and public policy as would make the carrying on of their work quite impossible. That is the very reason why the argument about police power is relevant here. Opposing counsel has attempted to answer this argument by saying that the steps taken in reference to appellant were not an exercise of police power, in the first place, and secondly, that if they were to be so regarded that the ousting of appellant from his last employment was an unreasonable exercise of such power. This whole argument is based on an utterly false premise. *We are not dealing with an act that is an alleged exercise of police power, as counsel's argu-*

ment assumes, but rather we are dealing with a more vital and paramount question, namely, that in order to preserve and protect the exercise of any kind of police power, officers, employees and other persons charged with the duty of exercising it, whether in an official or an administrative capacity, must remain under complete control.

To say that an act which is a proper exercise of police power is paramount to a vested or contract right and that the latter right must yield where any such proper act of police power is involved will become meaningless if at the same time the principle for which opposing counsel contends is affirmed, whereunder the municipality can make an alleged contract with a person, whether as an officer or employee under which that person acquires a vested contract right during a fixed period of time to perform and to discharge the governmental activities and functions of police power. If an act which is a proper exercise of police power is paramount to a vested contract right *as opposing counsel will concede*, then it inevitably follows that no person, officer or employee can acquire a vested contract right for a fixed period of time to administer and exercise such police power. To admit the one thing is to emphatically deny the other. And the question necessarily presented is not one as to the propriety shown or the wisdom exercised by the legislature in terminating the appellant's work under the Mayor, *but is as to the vital necessity that the right to so terminate it should be unconditionally reserved to the law making body where the exercise of police power is involved.*

Consider the gross anomaly if this view is not accepted as sound. Opposing counsel will concede that Act 13 of the Third Extra Session of 1934 legally abolished appellant's office, and by the same token legally created the Department of State Coordination and Public Welfare. Counsel will also admit that said Act legally transferred to the Mayor the appellant's authority and duties previously exercised

by him as Commissioner of Public Parks and Streets. H will not deny that by the same principle, Act 1 of the Firs Extra Session of 1935, transferred said authority and dutie to the Commissioner of State Coordination and Public We fare. Conceding all of this, appellant nevertheless con tends—without any legal duties or work left to him becaus of these enactments—he can sustain his position that whe he was appointed Superintendent of Public Parks and Streets in the "work under the Mayor", he acquired a vested contract right. The anomaly of this is so apparent as to require no further discussion, except to say that if the appellant is correct in this, then quite manifestly the prac ticable benefit of the principle so frequently applied by this Court sustaining the absolute right of the legislature to make governmental changes of the sort will be lost or de stroyed. For if the legislature is to have the right, as it ad mittedly does have, to make these changes in the depart ments of city government, and to abolish one department and create a new one and transfer to the latter the authority and duties exercised by the former, then it goes without say ing that anyone connected with these departments, either as officer or employee, is subject to the same legislative con trol. If vested contract rights could exist in favor of officers or employees of such departments the effect would be to practically defeat the admitted constitutional right to make such changes.

If appellant has a vested contract right, here many in stances may arise in the future where public officials about to leave office will take advantage of the principle to create employments by contract that can extend beyond their terms. The effect of this will of necessity be to embarrass new officials and will gravely hamper them in their handling of public business. The whole principle is grossly contrary to the democratic ideals of a republican form of govern ment. To carry any such principle to its logical conclusion

might bring up a constitutional question of far more serious import.

We respectfully submit that the motion to dismiss the present appeal should be sustained, and in the alternative in the event this Court should take full cognizance of the case on its merits that the decision and decree of the Supreme Court of the State of Louisiana should be ratified and affirmed.

Respectfully submitted,

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